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Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner,

vs.

PEDRO CASTRO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AMICUS CURIAE

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QUESTION ADDRESSED

The judgment at issue herein set aside a seniority system mandated by state law and substituted a racially segregated seniority system in order to preserve two minorities' current "share" of jobs in the Boston police and fire departments. The question addressed in this brief is whether the court erred as a matter of law in modifying a consent decree that required quota hiring to include retroactive, class-based seniority where (a) there was no finding that racial discrimination was continuing or that layoffs under the state seniority system would be unlawful, (b) the modification was not tailored to aid the actual victims of past discrimination, and (c) there was an explicit finding that any past discrimination had been unintentional.

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CONSENT OF THE PARTIES

Petitioner and Respondents have consented to the filing of this brief and their letters of consent will be filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 as a section of B'nai B'rith, the oldest civic service organization of American Jews, to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally inter-

ested in protecting the civil rights of all persons, be they minority or majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed amicus briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in such cases as, *e.g.*, *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Colorado Anti-Discrimination Comm'n.* v. *Continental Air Lines, Inc.*, 372 U. S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969); *San Antonio Ind. School Dist.* v. *Rodriguez*, 411 U. S. 1 (1973); *De Funis* v. *Odegaard*, 416 U. S. 312 (1974); *Runyon* v. *McCrary*, 427 U. S. 160 (1976); *McDonald* v. *Santa Fe Trail Transport. Co.*, 427 U. S. 273 (1976); *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978); *County of Los Angeles* v. *Davis*, 440 U. S. 625 (1979); *United Steelworkers of America* v. *Weber*, 443 U. S. 193 (1979); and *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980).

The Anti-Defamation League shares the concern of the courts below that a police force be integrated to reflect the heterogeneous nature of our society. Alternatives supported by the Anti-Defamation League to achieve this result include outreach programs to identifable underrepresented minorities, special training and educational assistance for deprived applicants, and the consideration of merit-based alternatives to strict seniority systems. The Anti-Defamation League cannot accept, however, the concept adopted in the decision below that each ethnic group is entitled to proportional representation in public jobs. Such a concept is wholly contrary to two basic principles that flow from the Constitution's guarantee of individual rights: first, that all persons be free of discrimination directed against them on grounds of race, religion, creed, sex or national origin, and second that each person be judged on the basis of his or her

individual merits—not on the basis of the ethnic or racial group to which he or she belongs. It is these fundamental principles that form the basis for our argument for reversal of the decision below or, alternatively, remand for further findings.

STATEMENT OF THE CASE

In 1970 a class of unsuccessful black and hispanic candidates for appointment as Boston police officers brought suit under 42 U. S. C. § 1983 and the Fourteenth Amendment, alleging a policy and practice of discrimination against minorities in the hiring of police officers.[1] Although 16.3% of the population of Boston was black or hispanic in 1970, only 2.3% of the officers on the police force were members of those minority groups.

The complaint did not allege, and plaintiffs did not attempt to prove, purposeful discrimination. Rather, the district court held that defendants had violated the equal protection clause of the Fourteenth Amendment based on its finding that the hiring criteria used, and in particular the civil service examination, produced a disparate adverse impact and were not sufficiently job related. See *Castro* v. *Beecher,* 334 F. Supp. 930 (D. Mass. 1971). On appeal, the United States Court of Appeals for the First Circuit affirmed as to liability but remanded for entry of a preferential hiring remedy. See *Castro* v. *Beecher,* 459 F. 2d 725, 737 (1st Cir. 1972).

On remand, the defendants agreed to a consent decree providing for priority hiring of a specific group of minority applicants who had passed the 1972 examination. *Castro* v. *Beecher,* 365 F. Supp. 655 (D. Mass. 1973). In 1975, the decree was reformulated to provide for the hiring of one

[1] In addition, because the complaint was filed and the case was tried before the 1972 amendments to Title VII extended the statute's coverage to government employees, there was no claim that Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e, had been violated.

minority policeman for each white policeman, with this system to continue until Boston achieved "a complement of minorities commensurate with the percentage of minorities within the community." See *Castro* v. *Beecher,* 522 F. Supp. 873, 875 (D. Mass. 1981). Since preferential hiring began in 1973, approximately 46% of the new hires have been minorities; as a consequence, the representation of minorities increased from the 2.3% level in 1970 to 11.7% in July, 1981. However, in the intervening decade the minority population in Boston increased to 30%, leaving the percentage of black and hispanic police officers "far below . . . the parity level which the Court's prior remedial orders were designed to achieve." *Id.* at 876.

In the spring of 1981, due to a tax reduction initiative, the City of Boston proposed to reduce the size of its police force. Under Massachusetts law, layoffs of civil service employees, including police officers, must be conducted on a last hired-first fired basis. See Massachusetts General Laws, Chapter 31, 33, 39. If the reduction in force had been carried out in accordance with state law, it would have reduced the percentage of minorities in the Boston police force to 6.2%.

On plaintiffs' motion, the district court modified the consent decree to prevent this result, superseding the state seniority system by establishing segregated seniority lists. Layoffs are to be conducted on the basis of these segregated lists so as to maintain the July 6, 1981 level of 11.7% minorities in the force. Under the court-ordered scheme, white officers with as much as eleven years service were laid off; by contrast, the most senior minority officers laid off had been hired in June of 1980. *Boston Chapter, NAACP* v. *Beecher,* 679 F. 2d 965, 976 n.14 (1st Cir. 1982).

On appeal, the First Circuit affirmed, holding that the past discrimination created a "compelling need" for a race-conscious remedy and that the district court's modification of the decree was reasonable because it was "necessary to prevent the

department[ ] from regressing to the state of precipitous racial imbalance that prevailed" when the litigation began in 1970. *Id.* at 977.

SUMMARY OF ARGUMENT

At the outset, it should be noted that modification of the state seniority system was not based on a finding by the district court that the reductions in force of the Boston police department were racially motivated or that the seniority system itself unlawfully discriminated against minorities. Rather, the courts below approved the modification solely as a necessary extension of the quota remedy approved in 1973. We submit that in modifying the consent decree to require a racially segregated seniority system the district court erred in at least three material respects.

First, on the basis of the record before it, the modification was beyond the court's remedial powers. A court cannot intervene if, after racial discrimination has been eliminated, new circumstances unrelated to any type of discrimination decrease the number of minority employees in the work-force. *Pasadena City Board of Education* v. *Spangler,* 427 U. S. 424 (1976). Before it modified the decree in this case, the district court should have at least held a hearing to determine whether discrimination had been eliminated and whether the lay-offs themselves were improper.

Second, the implementation of a racially segregated seniority system was a clear abuse of the court's equity power. Retroactive seniority is a type of relief that may be given only to identifiable victims of discrimination; it is an abuse of discretion to grant such seniority on a class-wide basis to all newly hired minority employees. *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324 (1977). Furthermore, this Court has consistently held that in fashioning a race-conscious remedy, the effects of the remedy on non-minority employees must be weighed. In this case, officers with as much as eleven

years' seniority lost their jobs so that minority officers who had been on the force for as little as two years could keep theirs. Such specific and drastic harm cannot be justified on the ground that it is good social policy to have proportional representation of every racial group in the police force.

Third, the quota remedy that the modification was designed to protect is itself suspect. A continuing remedy such as an injunction must be based on an appropriate finding of liability. If a change in the law indicates that liability was in fact wrongly determined, then the person burdened with the injunction is entitled to a modification as a matter of law. *System Federation* v. *Wright,* 364 U. S. 642 (1961). *Washington* v. *Davis,* 426 U. S. 229 (1976), makes it clear that a public employer is liable under § 1983 only for purposeful discrimination and therefore that a quota remedy cannot be employed absent such a finding. Under these circumstances, it was improper to extend the remedy even further by granting retroactive class-wide seniority.[2]

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[2] This is not to suggest that there was in fact no intentional discrimination practiced in hiring police officers in Boston prior to 1970; however, plaintiffs failed to plead or prove purposeful discrimination.

ARGUMENT

I. The Grant of Class-Wide Retroactive Seniority Was Beyond the Court's Remedial Powers.

The rationale given by the courts below for disregarding the seniority provisions of Massachusetts' civil service law was their desire to maintain each minority's proportionate share of jobs on the police force so that the numerical gains achieved through eight years of quota hiring would not be lost. This rationale cannot, as a matter of law, support the modification of the decree.

In *Pasadena* v. *Spangler*, 427 U. S. 424 (1976), this Court dealt with a situation where schools desegregated by court order had become racially imbalanced once again through population shifts that had not been found to be the result of actionable discrimination. The Court held that a federal court had no power to issue a remedy designed to correct such an imbalance. In so holding, the Court relied on its earlier determination in *Swann* v. *Board of Education*, 402 U. S. 1, 24 (1971), that there is no "substantive constitutional right [to a] particular degree of racial balance or mixing." Thus, once the constitutional violation has been remedied, a court has no power to issue additional decrees in order to maintain racial proportionality.

The same analysis applies here. The first consent decree in this case, which was entered into in 1973, established two priority pools of minority applicants, one for applicants who had actually suffered discrimination prior to 1972 and one for new applicants who may have been discouraged from applying by the discriminatory tests and recruiting practices in effect prior to 1972. Assuming (and there is no evidence in the record to the contrary) that hiring decisions were made in accordance with this decree, it appears that the past effects of dis-

crimination were remedied insofar as identifiable victims were concerned. In addition, there has been no finding of further discrimination in hiring since the decree went into effect; on the contrary, from 1973 to 1981, almost half of the new officers hired were members of minority groups, raising the percentage of minorities on the force to 11.7%. Finally, there was also no finding that the reductions in force ordered in 1981 were purposefully discriminatory or that the seniority system mandated by state law was anything but bona fide. Thus, the record would indicate that discrimination in hiring has ended and, although layoffs under the seniority system would cut the percentage of minorities in the workforce in half, these layoffs would not in and of themselves constitute actionable discrimination.[3]

Under the rationale adopted in *Spangler*, the district court therefore had no power to issue further orders to "remedy" the drop in minority representation on the force, no matter how unfortunate that drop might seem. The only way to avoid this result on the current record is to take the position that because racial proportionality had not been achieved by 1981, discrimination had not yet been eradicated. This position, however, would give minorities a perpetual right to a proportionate share of the jobs in the Boston police department. For if the court had the power to act here, eight years after the decree went into effect, then it would presumably have the power to order new remedies whenever the percentage of minority officers fell below their percentage in the general population for any reason.

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[3] It is well settled that intentional discrimination must be shown before a public employment practice having a disparate impact on minorities will be considered a violation of either § 1981 or § 1983. See *General Building Contractors Ass'n* v. *Pennsylvania*, 102 S. Ct. 3141 (1982); *Washington* v. *Davis*, 426 U. S. 229 (1976). While Title VII provides remedies for some types of unintentional discrimination, § 703(h) specifically preserves seniority systems unless they are purposefully discriminatory.

Such a result would be utterly inconsistent with *Spangler* itself, which denies any claimed constitutional right to racial balance. It would also be inconsistent with the concept of individual opportunity that our Constitution and civil rights laws embody. As the Court stated in *Los Angeles* v. *Manhart,* 435 U. S. 702, 708 (1978), with respect to Title VII: "The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class."

Finally, the approach adopted by the lower courts would revive the proposition, already rejected by this Court, that each identifiable ethnic and racial group is "entitled" to a measurable share, and only that share of public jobs. As the Court stated in *Furnco Construction Corp.* v. *Waters,* 438 U. S. 567, 579 (1978):

> "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." (Emphasis in original.)

While an integrated police force is surely desirable, the police force should be truly integrated. Boston should not have a black police force for its black community, an Irish police force for its Irish Community and an Italian police force for its Italian community. *DeFunis* v. *Odegaard,* 416 U. S. 312, 342 (1974) (Douglas, J., dissenting).

Because of its reliance on the concept of racial proportionality, the district court failed to consider whether in fact all identifiable victims of past discrimination had been adequately protected, whether discrimination in the department had been eliminated by 1981, and whether the layoffs themselves con-

stituted a new violation. At the least, this Court should remand for consideration of those issues, which are crucial to a determination of whether the district court had the power to take *any* remedial action in response to the planned layoffs.

II. The District Court Abused Its Discretion by Extending Retroactive Relief to the Entire Class of New Hires.

The courts below also erred in this case by treating the grant of retroactive, class-wide seniority as a virtually automatic response to the proposed reductions in force. The establishment of segregated seniority lists to be used in pursuing large-scale cutbacks was a drastic expansion of the consent decree which should have been analyzed on the basis of the principles ordinarily applied to a court's exercise of its equitable powers. When those principles are applied, it is clear that the district court exceeded its power.

A. The District Court Failed to Distinguish Properly Between Prospective and Retroactive Relief.

In granting class-wide retroactive seniority, the courts below failed to recognize the crucial distinction between prospective and retroactive relief. While courts have often exercised broad discretion in formulating prospective remedies (such as those involving hiring policies), retroactive remedies (such as an award of retroactive seniority rights) are governed by a stricter standard. In *International Brotherhood of Teamsters* v. *United States,* 431 U. S. 324, 365 (1977), this Court specifically limited retroactive seniority to identifiable victims of discrimination. The Court thus held that a lower court decision to grant retroactive seniority on a class-wide basis to every minority employee was improper; instead, this Court held that retroactive relief should have been limited to those persons who in the past had actually applied and been rejected or who had been discouraged from applying because of the discrimination.

Although this is not a Title VII case, the same limits on the courts' power apply here. As the Third Circuit stated in *Gurmankin* v. *Costanzo,* 556 F. 2d 184, 188 (3rd Cir. 1977), "There is no distinction in the law of equitable remedies under Title VII and suits brought in reliance on 42 U. S. C. § 1983, or directly on the fourteenth amendment."

The first consent decree approved in this case in 1973 provided for a series of priority hiring pools. Group A consisted of all minority applicants who had failed the examinations given from 1968 through 1970, but had passed the 1972 examination. Applicants from Group A were to be hired on a one-for-one basis with applicants from Group B, who were all those (white) applicants certified as eligible in 1970 and 1971. Once Group A was exhausted, persons in Group C, which was made up of minority applicants who had never taken the examination before, but had passed the 1972 examination, could be hired, on the basis of one from Group C for every three from Group B. Once all three groups were exhausted, the department could hire from Group D, which consisted of all other (white) candidates who had passed the 1972 examination.

Thus, Group A consisted of those who had been discriminated against. In the district court's view, Group C was also a class of victims, those whose desire to apply for an opening as a police officer may have been chilled by prior discriminatory practices. *Castro* v. *Beecher,* 365 F. Supp. 655, 660 (D. Mass. 1973). If, in 1981, officers in either Group A or Group C were to be laid off, the district court had the power to consider whether under *Teamsters* they were entitled to retroactive seniority.

In 1975, the consent decree was reformulated to extend the quota hiring concept to new minority applicants. There is nothing in the record to suggest that these individuals had ever suffered discrimination or had been discouraged from applying

earlier because of discrimination. Therefore, under the *Teamsters* analysis, the district court erred by giving retroactive seniority to these applicants as well.

If the Court determines that the liability issue should not be re-examined (see part III, below), it should remand for a determination of whether retroactive seniority should be granted to specific, identifiable victims of discrimination.

B. The Courts Below Failed to Balance the Equities Properly.

The granting of class-wide, retroactive seniority was also erroneous because the courts failed to properly weigh the harm that such a remedy inflicted on white officers. As Justice Powell stated in his concurring opinion in *Fullilove* v. *Klutznick, supra,* 448 U. S. at 514,

> "A race-conscious remedy should not be approved without consideration of an additional crucial factor—the effect of the set-aside upon innocent third parties."

Here, the court failed to perform "the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." *International Brotherhood of Teamsters* v. *United States, supra,* 431 U. S. at 372.

In cases where this Court has approved race-conscious remedial programs, the "expectations" that were frustrated have involved an ability to compete for certain benefits such as new jobs, promotions, future contracts and the like. In those cases the Court has determined that any injury to white employees' expectations of future benefits has been counterbalanced by the need to counteract prior pervasive discrimination. Thus, in *United Steelworkers of America* v. *Weber,* 443 U. S. 193 (1979), white employees were foreclosed from applying for half of the openings in a new craft training program established specifically to remedy the past effects of

segregation in certain job categories. The Court noted that white employees could still compete for the remaining half of the openings and that, in any event, the plan was "a temporary measure" to eliminate "conspicuous racial imbalance in traditionally segregated job categories." The plan did *not* require the "discharge of white workers and their replacement with new black hirees." Under these circumstances, the Court found that the plan did not "unnecessarily trammel the interests of the white employees." 443 U. S. at 208.

Similarly, in *Fullilove* v. *Klutznik, supra,* Congress had foreclosed white contractors from bidding on only 10% of new federal contracts worth $4 billion, with waiver provisions in the event that qualified minority contractors could not be found. This was also a temporary and limited measure. In his concurring opinion, Justice Powell concluded that any "marginal unfairness to innocent nonminority contractors is not sufficiently significant—or sufficiently identifiable—to outweigh the compelling governmental interest in redressing the [purposeful] discrimination that affects minority contractors." 448 U. S. at 515.

In addition, it should be noted that neither *Weber* nor *Fullilove* involved a court-ordered remedy. *Weber* was a voluntary affirmative action plan; *Fullilove* involved the power of Congress under § 5 of the Fourteenth Amendment to spend federal funds in a way that would tend to redress past intentional discrimination. In both cases, the Court recognized that imprecision in the means of remedying the past discrimination could be tolerated.

Here, by contrast, it is a court-ordered remedy that is at issue. It is well-settled that in framing an equitable decree, the district court must "tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation' " proved, *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406, 420 (1977); see also *General Building Contractors* v. *Pennsylvania, supra,* 102 S. Ct.

at 3154. Furthermore, unlike the "temporary" measures at issue in *Fullilove* and *Weber*, here the court's remedial efforts have already lasted for eight years and are likely to continue long into the future as it strives to achieve the goal of racial proportionality.

Most importantly, in this case significant burdens have been imposed on employees solely because they are white: eleven-year veterans on the force have lost their jobs as a result of the court's order, so that minority officers with less than two years' seniority can remain on the job. There is no indication that such a burden was necessary to protect minority officers who would have enjoyed more seniority but for discrimination prior to 1973.[4] Instead, the only countervailing consideration relied upon below was the court's unilateral determination that it is good social policy to have a police force that precisely reflects the proportion of various racial groups in the community. As the court stated,

> "An important factor in these cases is that they involve the police and fire departments of a large metropolitan city that now has a minority population of at least 30 percent. We are concerned here not with simply redressing the rights of individuals who suffered racial discrimination; the issue is whether the progress made to date in integrating the departments will be preserved. As Judge Wyzanski noted, the public interest requires a racially balanced police force. *Castro* v. *Beecher*, 365 F. Supp. at 660. We do not need expert testimony to make the point that, unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility and strife between the citizenry and those depart-

[4] As noted above, how much retroactive seniority must be given to protect any victims of discrimination is an issue that the district court should be directed to consider on remand.

ments. The inevitable result is poor police and fire protection for those who need it most."[5]

Certainly one can question the court's view, which is unsupported by any evidence, that racial proportionality is necessary to the effective functioning of the police department. Furthermore, the Court of Appeals ignored significant policy considerations on the other side. While it is true, as the First Circuit itself noted, that there is nothing magical about the use of a seniority system to decide who is to be laid off, that is the system chosen by state law.[6]

Moreover, under Title VII, Congress has specifically protected seniority systems under circumstances similar to those here. Thus, a bona fide seniority system is valid even though minority workers as a group may have less seniority as a result of pre-Act discrimination. A court has no power under Title VII to ignore such a system in order to eliminate the past "effects" of discrimination. See *Teamsters* v. *United States, supra,* 431 U. S. at 348-355.

A more fundamental question, however, is whether a court may treat racial proportionality as an important countervailing interest. We submit that it may not. Again, the Constitution focuses on the protection of individual rights—not the allocation of benefits and burdens among groups. Remedies must be similarly focused on providing equal opportunity for individ-

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[5] It is interesting to note that in the passage cited, Judge Wyzanski, while commenting on the importance of having all groups represented on the police force, specifically stated that "This does *not* imply that any group is entitled to a quota, nor to a fraction roughly corresponding to the fraction of the total population which belong to that group." 365 F. Supp. at 659 (Emphasis in original)

[6] Like the Court of Appeals, we do not believe that a seniority system must necessarily be used in deciding who should be laid off. However, any system that is selected must be rational and racially neutral in its application. The fact that a disparate impact results from the application of such a system does not necessarily make it invalid or unlawful.

uals. Giving preferences to various groups on the basis of their race postpones rather than hastens the day "when no governmental decision will be based upon immutable characteristics of pigmentation or origin," *Fullilove* v. *Klutznick, supra,* 448 U. S. at 516 (Powell, J.) As Justice Powell observed in *University of California Regents* v. *Bakke,* 438 U. S. 265, 298 (1978):

> "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."

Thus, the court's belief that racial proportionality in the police force was desirable was not a factor that could properly be taken into account. Since no other countervailing considerations were cited, the balance clearly tipped in favor of the officers with seniority, who were singled out by state law for protection, not on the basis of their race, but rather on the racially neutral basis of length of service.

III. Modification of the Consent Decree Was Inappropriate in Light of Intervening Changes in the Law With Respect to Liability.

There is no question but that the district court had the power to modify its injunction because of changed circumstances. Normal principles of *res judicata* do not apply to continuing injunctions. "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *United States* v. *Swift & Co.,* 286 U. S. 106, 114 (1932).

The problem in this case is that the only new "event" considered by the district court was the change in factual circumstances brought about by the Boston fiscal crisis. Although the matter was called to its attention, the district court failed to consider, or at least failed to give proper weight, to the change in legal circumstances wrought by *Washington* v. *Davis,* 426 U. S. 229 (1976).

In *Washington* v. *Davis,* the lower court held that unintentional discrimination in the hiring of police officers for the District of Columbia police department violated the equal protection component of the Due Process Clause of the Fifth Amendment.[7] This Court reversed, holding that "proof of discriminatory racial purpose," is necessary to establish a violation of equal protection guarantees. *Washington* v. *Davis,* 426 U. S. 229, 245 (1976). In the course of its opinion, the Court specifically cited *Castro* as exemplifying a theory of the equal protection clause with which it disagreed. See 425 U. S. 229, 244 n.12, 245 (1976).[8]

The initial finding of liability in this case was therefore in error. It follows that the remedial scheme predicated upon that initial finding is similarly flawed. The remedial powers of the federal courts may "be exercised only on the basis of a violation of the law and [may] extend no farther than required by the nature and extent of that violation." *General Building Contractors* v. *Pennsylvania,* 102 S. Ct. 3141, 3154 (1982). See also

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[7] As in this case, the plaintiffs in *Washington* v. *Davis* complained of the use of hiring criteria and particularly of an entrance examination that had a disparate adverse impact on minority applicants and was not sufficiently job-related. Again as in this case, the complaint was filed before Title VII was extended to government employees, and therefore it too was tried solely on a constitutional theory.

[8] In its 1972 opinion in this case, the First Circuit "acknowledged that there was no claim or evidence that defendants had a discriminatory purpose or pursued any practice that was discriminatory on its face." *Castro* v. *Beecher,* 459 F. 2d 725, 728 (1st Cir. 1972). See also *Castro* v. *Beecher,* 334 F. Supp. 930, 935 (D. Mass. 1971). Liability was premised on the theory that the standard for liability under the equal protection clause was the same as that set forth in *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971), as applicable under Title VII and that proof of discriminatory purpose was unnecessary. See *Castro* v. *Beecher,* 459 F. 2d 725, 732-33 (1st Cir. 1972). This was precisely the theory rejected by this Court in *Washington* v. *Davis.*

Hills v. *Gautreaux*, 425 U. S. 284, 293, 294 (1976). In this case the legal principles underlying the court's finding of a violation of law were repudiated and hence there is no basis for a remedy. As this Court recently held in *General Building Contractors, supra*, 102 S. Ct. at 3155, "the imposition of minority hiring quotas [is not] the sort of remedy that may be imposed" "[a]bsent a supportable finding of liability."

Given the change in law announced in *Washington* v. *Davis*, there is considerable authority that petitioner was entitled, as a matter of right, to have the decree vacated in its entirety. It necessarily follows that the district court erred when, without making the finding of purposeful discrimination required by *Washington* v. *Davis*, it not only maintained its remedial plan but enlarged upon it.

The leading case on modification of consent decrees because of changes in legal circumstances is *System Federation* v. *Wright*, 364 U. S. 642 (1961). There, non-union railroad workers brought suit against a number of railroads and unions charging them with discrimination in violation of the Railway Labor Act. At the time of the suit the Railway Labor Act forbade discrimination against non-union employees through the negotiation of union shop agreements. The suit was settled by a consent decree which prohibited the defendant unions from negotiating such agreements. Thereafter, however, Congress amended the Railway Labor Act to permit union shop agreements. Some six years later, the unions petitioned the district court, which had retained jurisdiction, to modify the consent decree to eliminate the prohibition. After a hearing, the district court denied the petition on the ground that the unions were bound by their original agreement and that permitting union shop agreements would lead to discrimination against the plaintiff non-union employees.

This Court reversed. Although noting that petitions for modification are normally addressed to a court's discretion, the

Court held that where there has been a change in law destroying the legal basis for the original decree, modification is a matter of right. The Court rejected the district court's theory that modification could be denied because union shop agreements would lead to impermissible discrimination against the non-union plaintiffs. The Court held that in determining what forms of discrimination were impermissible and therefore subject to its continuing remedial powers, the district court was bound to consider the law as it then stood, not the law as it existed at the time of the original decree or the district court's own notion of the equities. Finally, the Court rejected the argument that modification could be denied because the defendant unions were bound by their original agreement: "The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *Id.* at 651. "The parties have no power to require of the court continuing enforcement of rights the statute no longer gives." *Id.* at 652.

The same principles govern here. As in *System Federation,* the district court here was trying to provide a remedy for a form of discrimination—in this case pre-Title VII unintentional discrimination—that was considered illegal at the time of the original decree but which, due to intervening changes in the law, has since been recognized as permissible. Here, too, as in *System Federation,* the remedy protects non-existent rights by depriving petitioners of rights conferred upon them by statute—in this case rights accruing under the Massachusetts seniority system. The remedy in *System Federation* had become improvident because of changes in legal circumstances; it is equally improvident here. Moreover, in *System Federation* the defendants sought to vacate the initial decree entirely; here, petitioners ask only that it not be enlarged.

The conclusion that a continuing remedy that has become inappropriate because of intervening changes in the law should be modified is reinforced by this Court's decision in *Pasadena City Board of Education* v. *Spangler, supra,* 427 U. S. 424. In *Spangler,* the Court rejected the suggestion by one Court of Appeals judge that the school board was barred from seeking a modification by its failure to appeal the 1970 decree. The Court noted that its intervening decision in *Swann* v. *Board of Education,* 402 U. S. 1 (1971), had specifically rejected the notion that annual adjustments in the schools' racial composition could be ordered to prevent *de facto* segregation. This, plus the fact that the parties had not understood the decree in 1970 to contain an annual adjustment feature, made a "compelling case" for modification under the *System Federation* rationale. 427 U. S. at 438.

As in *Spangler,* the change in legal circumstances since the original decree has made the district court order enlarging that decree improvident as a matter of law and puts the enlargement of the decree to include retroactive seniority beyond the courts' remedial power.

CONCLUSION

The Anti-Defamation League deplores the continued existence in this country of discrimination based upon race, religion, sex and perceived national or ethnic origins. Not until such discrimination is eliminated will the United States be in fact a nation where all citizens enjoy equal opportunities, as they should. However, remedies like the one imposed in this case, which attempt to parcel out benefits and burdens to racial groups on the basis of their proportionate share of the population, do not promote equal opportunity; rather, they foster an arbitrary and divisive focus on race and ethnic origin, instead of on the individual and individual merit. The lower courts' decision to mandate a segregated seniority system in order to preserve the "progress" that had been made toward achieving proportionate representation of minorities in the police force is particularly disturbing, as it seems to foreshadow a permanent concern with allocating benefits and burdens proportionally among identifiable groups on the basis of race or ethnicity, rather than fairly among individuals. No matter how benign or laudable the purpose, the result of such remedies will be further division and discrimination. As Professor Bickel stated in The Morality of Consent, 133 (1975),

> "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant."

For this reason and the reasons stated above, the judgment of the courts below should be reversed or, alternatively, the case should be remanded for further findings.

Respectfully submitted,

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